Dombrowski v. *Eastland*, 387 U.S. 82, 87 S.Ct. 1435, 18 L.Ed.2d 577 12
Epperson v. *Arkansas*, 393 U.S. 97 (1968) 13
Freeman v. *Gould Special School District*, 405 F.2d 1153 (8th Cir. 1969) 13
Lau v. *Nichols*, ... U.S. ....., 39 L.Ed.2d 1 (2-18-74) 25
McLaughlin v. *Tilendis*, 398 F.2d 287 (7th Cir. 1968) 14
Monroe v. *Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 12
Murray v. *West Baton Rouge Parish School Board*, 472 F.2d 438 (5th Cir. 1973) 14
Ordway v. *Hargraves*, 323 F. Supp. 1155 (D. Mass. 1971) 16
Pickering v. *Board of Education*, 391 U.S. 563 (1968) 13
Pierson v. *Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 12
San Antonio School District v. *Rodriquez*, ... U.S. ....., 36 L.Ed.2d 16 25
Shelton v. *Tucker*, 364 U.S. 479 (1960) 13
Shock v. *Tester*, 405 F.2d 852 (8th Cir. 1969) 14
Smith v. *Losee*, 485 F.2d 334 (10th Cir. 1973) 12
Snowden v. *Hughes*, 321 U.S. 8 14
Tenney v. *Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 12
Tinker v. *Des Moines Community School District*, 393 U.S. 503 (1969) 13
Vought v. *Van Buren Public Schools*, 306 F. Supp. 1388 (A.D. Mich. S.D. 1969) 24

RULES

Rule 19, Supreme Court of the United States 10, 11

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1285

S. L. INLOW, DUDDY WALLER, JOHN P. WOOD, ED STEVENSON, RACHAEL GOFORTH, BOB PHILPOT, JIM AYLESHIRE, RAYMOND STROUD, BILL PLUNKETT, and MENA SPECIAL SCHOOL DISTRICT,

Petitioners,

vs.

PEGGY STRICKLAND, a Minor, by Mr. and Mrs. Virgil Justice, Her Parents and Next Friends; VIRGINIA CRAIN, a Minor, by Doris Crain, Her Mother and Next Friend,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion delivered in the Circuit Court of Appeals is not as yet officially reported but a copy is appended to the Petition for Writ of Certiorari. The opinion was delivered on August 29, 1973, opinion No. 72-1774.

On September 11, 1973 the Petitioners applied to the Court of Appeals and obtained an order extending their time for the filing of petition for rehearing to and including September 19, 1973.

The petition for rehearing en banc was filed September 19, 1973 and was overruled by order entered September 27, 1973.

JURISDICTION

Respondents contend that the Order extending the time allowed the Petitioners for making application for a Writ of Certiorari was improperly granted in this case. Also, the Petitioners have attempted to drop out S. L. Inlow and Duddy Waller as parties between the time of making the application for extension of time for filing Petition for Writ of Certiorari and the time the Petition was filed. Respondents challenge the right of any of the defendants to drop out at that step.

Extension of Time

The mandate of the Court of Appeals was issued on October 10, 1973.

A dissenting opinion relating to the denial of the Petition for Rehearing En Banc was filed by Chief Judge Mehaffy on October 18, 1973. Judge Mehaffy was joined by Circuit Judges Stephenson and Webster.

All of the Defendants, including S. L. Inlow and Duddy Waller, as Petitioners, represented by Herschel H. Friday and G. Ross Smith, filed in this court a pleading styled APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI, addressed to the Honorable Harry A. Blackmun, on December

17, 1973, only nine days prior to the date on which the time for filing a petition for Writ of Certiorari would expire.

An order granting the requested extension of time to and including February 22, 1974, was entered by Justice Blackmun on the date of filing.

Respondents, unaware that the extension of time had already been granted, filed a response to the application for extension of time which was mailed for filing on December 18, 1973. Respondents never received any acknowledgment from the clerk that this pleading was ever received or filed.

On December 20, 1973 the Respondents mailed for filing a MOTION TO REVOKE ORDER EXTENDING TIME. Respondents received notice from the clerk dated January 2, 1974 that the Motion to Revoke was presented to Mr. Justice Blackmun and denied.

The PETITION FOR A WRIT OF CERTIORARI was filed by the Defendants herein on February 22, 1974.

Respondents contend that there was no basis for granting the extension of time. In support thereof, Respondents refer to their pleading styled: RESPONSE TO APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI, hereto attached as Appendix I, and to their BRIEF SEPARATE STATEMENT IN SUPPORT THEREOF, attached hereto as Appendix II. Likewise, Respondents attach hereto as Appendix III a copy of their MOTION TO REVOKE ORDER EXTENDING TIME.

In effect, Respondents contend that it is not contemplated that extensions of time will be granted to Petitioners who wait from September 27, 1973 until December 13,

1973 (the date on which present counsel stated in their APPLICATION FOR EXTENSION OF TIME that they had been employed) in which to change attorneys. That is 77 days. Therefore, Respondents respectfully state that the time for the filing of the Petition for Writ of Certiorari should not have been extended.

Parties

In a footnote on the first inside page of the printed petition the petition states:

> [1]Petitioners are: John P. Wood, Ed Stephenson, Rachael Goforth, Bob Philpot, Jim Ayleshire, Raymond Stroud, Bill Plunkett, members of the Board of Education of the Mena, Arkansas Special School District, and the Mena Special School District.

Until the time of that footnote, the Petitioners included S. L. Inlow and Duddy Waller. It is the contention of the Respondents that no one of the Defendants can purport to drop out of the case in that manner. If notice of intention to drop any of the Defendants had been given at the time the APPLICATION FOR EXTENSION OF TIME FOR FILING A PETITION FOR A WRIT OF CERTIORARI was filed, the Respondents would have had an opportunity to take steps to insure that the portion of the Court of Appeals opinion and order holding in favor of those two Defendants would be brought up also along with the rest of the opinion and order for equal consideration. Respondents resist any petition for writ of certiorari at all, but if one is to be considered, the Respondents contend that it should be considered equally for all of the Petitioners who joined in the application for extension of time for filing of the Petition.

QUESTIONS PRESENTED

Petitioners set out on pages two and three what Petitioners conceive to be the questions presented by this Petition. The first one is stated as follows:

> 1. Whether federal courts have jurisdiction to invalidate, on grounds of insufficiency of evidence, a public school board's decision to suspend a tenth grade student for possession and use of intoxicating beverages at a school function on school premises, where the student presents no claim of deprivation of fundamental constitutional rights of speech, association, religion or equality of race or sex, and where the procedures utilized in effecting the suspension have not been held unlawful?

Several circumstances described in the question do not exist in this case at all. (1) Invalidation was not on the grounds of insufficiency of the evidence. It was on the basis of not requiring any evidence at all. (2) There was no "possession or use of intoxicating beverages etc. . ." (3) The students do present claims of deprivation of fundamental constitutional rights. (4) The procedures utilized were held to be unlawful. Therefore, it is the position of the Respondents that the question as phrased by the Petitioners is not involved in any way in this case. It never has been involved in this case and it is not now involved.

RESPONDENTS' STATEMENT OF FACTS PERTINENT TO THIS PETITION

The pertinent facts as shown by proof included in the appendix filed with the Court of Appeals are that,

on a Friday, February 18, 1972, at a meeting in his office, the Defendant, Duddy Waller, principal of Mena High School, told these two plaintiffs and a third girl, Jo Wall, that they were suspended from Mena High School based on their confession to him that they had participated in spiking the punch at a meeting of a school group, a part of the Home Economics class a few days earlier (A. 41).

Mr. Waller told the plaintiffs and Jo Wall that the School Board would be called into a meeting to consider his action but he did not say when this would happen (A. 40). Later that same day, the defendants Inlow and Waller did contact the individual members of the Board and a meeting was scheduled for later that same evening. A basketball game was to be played at the High School gymnasium that night and the meeting was set up to follow the basketball game. Final arrangements were completed at around 5:30 or 6:30 o'clock P.M. for the meeting (A. 40). No notice of the fact of the meeting nor of the time or place thereof was given either to the plaintiffs or to the parents of the plaintiffs and neither the plaintiffs nor their parents were invited to attend and none of them did attend (A. 40, 48). Plaintiffs and their parents had no knowledge of the Board meeting until the following morning.

Unknown to the plaintiffs, the meeting of the board took place following the ball game and beginning at around 9:30 o'clock that evening. The whole purpose of the board in meeting was to consider the proposed disciplinary action against these two plaintiffs and Jo Wall. It was a called special meeting for that purpose only. At the beginning of the meeting the defendant, S. L. Inlow, introduced Mrs. Curtis Powell, the Home-Ec teacher, and the defendant Duddy Waller, and told the board that these two teachers were familiar with the details and would furnish the information to the Board (A. 49-50). No other witness was present (A. 49). No other person attempted to furnish any information to the board. Mrs. Curtis Powell knew nothing of the incident except what had been reported to her by the children. She had witnessed nothing herself and merely related to the Board that the girls told her they had put an alcoholic beverage in the punch (A. 39). Mrs. Curtis Powell had no knowledge of her own as to whether the drink the children were calling an alcoholic beverage actually was one or not (A. 38, 39).

The only other witness was the defendant, Duddy Waller, and he again merely repeated to the board what the girls had told him. Neither he nor Mrs. Powell had made any independent investigation to determine what the facts were. Neither was familiar with the particular type of so-called "alcoholic beverage" named (A. 39) to them by the girls. Likewise, the board made no investigation of its own as to what type of so-called "alcoholic beverage" had been acquired by the three girls nor as to how much of it they had allegedly placed in the punch (A. 59, 60).

After making their report to the board of the information given them by the children both teachers, Mrs. Curtis Powell and the defendant, Duddy Waller, recommended to the board that the board show any leniency which it felt it could toward the girls (A. 50). At this stage of the proceeding, a telephone call came into the board meeting room and the call was answered by the defendant Inlow. The call was from another teacher (A. 50) of Mena High School, Mr. Curtis Powell, a science teacher, and husband of Mrs. Curtis Powell, the Home-Ec teacher who was appearing as a witness before the board, and Mr. Curtis Powell reported in his telephone call to Mr. Inlow that some person had reported to him, Mr. Powell,

that Jo Wall, one of the three girls then under consideration, had been involved in an altercation earlier that evening, following the basketball game and prior to the board meeting, and apparently while the crowd was leaving the basketball game at the gymnasium, with one of the children who had informed on the plaintiffs and Jo Wall.

Mr. Curtis Powell had not witnessed such altercation himself but merely had been told about it by someone else, and Mr. Curtis Powell thought it was information which the board should have in considering the punishment appropriate for the two plaintiffs and Jo Wall. Mr. Curtis Powell knew that the board was having its meeting then for that purpose because he knew that his wife was one of the teachers appearing before the board as a witness against the three girls.

After receiving this information from Mr. Curtis Powell, and knowing that only Jo Wall was the one reported by hearsay upon hearsay to have participated in an altercation that evening, the defendant, S. L. Inlow, nevertheless, withheld that name in reporting to the board (A. 51). The report of S. L. Inlow to the board was that the call was from a teacher reporting that one of the three girls under consideration had been involved in an altercation outside the gymnasium that evening. S. L. Inlow did not give the name of which girl it was, even though he had been told by Curtis Powell (A. 60).

Mrs. Curtis Powell, without asking which one of the girls was reported to have been involved, withdrew her recommendation as to all three girls, "washing her hands of the whole affair" (A. 52).

The defendant, Duddy Waller, without asking which one of the three girls was reported to have been involved, likewise withdrew his recommendation for leniency (A. 52).

The School Board, without asking which one of the three girls was reported to have been involved, voted to expel all three of the girls for the rest of the semester (A. 60, 61).

The defendant Inlow, knowing that only Jo Wall was reported by hearsay upon hearsay to have been involved in the altercation, sat there and witnessed the turnabout of the two teachers and the action of the board in expelling all three girls and never volunteered the name of the one girl involved in the hearsay report, or even that Mr. Curtis Powell had given him the name of which one.

In their STATEMENT the Petitioners described the girls' actions on page four as follows:

> The girls admitted that they had poured a quantity of alcoholic beverage into punch served at an extracurricular school function . . . .

This statement creates a picture of the girls emptying a large container of "alcoholic beverage" into a punch bowl. The picture is not true. What actually happened is accurately described in the opinion of the Court of Appeals as follows:

> The three girls obtained permission to leave the campus and travelled to a tavern in Oklahoma where Jo Wall purchased two 12-oz. bottles of a flavored malt beverage "Right Time." The three students purchased six 10 ounce containers of a soft drink and combined the total eighty-four ounces of liquid in a milk carton and returned with the mixture to school. To the liquid was then added enough water to total one and one-half gallons of punch, which was served at the gathering.

That statement of what transpired is fair to the girls. That contained in the Petitioners' brief is not.

ARGUMENT

Rule 19 of this Court provides, in pertinent part, as follows:

> "1. A review on Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:
>
> (a) (Applicable to State Courts).
>
> (b) Where a Court of Appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this Court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> 2. (Not applicable)."

Under the subdivision of their Brief beginning on page 6 and headed REASONS FOR GRANTING THE WRIT, the Petitioners fail to set out any of the foregoing grounds. The closest they get is as follows:

> 1. (On page 7): The holding of the Court of Appeals in this case is a drastic departure from those settled principles and will vastly increase the frequency and extent of judicial interposition in public school matters.
>
> 2. (On page 12) (The) Court of Appeals also has increased the exposure of public school boards to liability for monetary damages in suits by students alleging deprivation of civil rights.

Petitioners never make any argument that any one of those propositions comes close to the circumstances set out in Rule 19. In effect, the Petitioners are merely arguing the merits of their appeal on the premise that the Court of Appeals has erred in its findings of fact and conclusions of law. It is not the function of a Petition for Writ of Certiorari to argue the merits of the appeal. Some basis must be demonstrated for this Court to exercise its discretion in granting a Petition for Writ of Certiorari and any argument on the merits would come only after this Court reached the decision that the particular case involved questions of the import suggested by Rule 19.

This is not such a case. If it were, Petitioners would be able to point to the reasons why it were.

On the issue of federal court jurisdiction in suits involving the constitutional rights of students of public schools, this Court has already treated that subject in several decisions, probably the most notable of which is *Brown* v. *Board of Education*, 349 U.S. 294, 99 L.Ed. 1083 (1954). This Court is more familiar with that line of cases than is the writer of this Brief.

As to the doctrine of Governmental Privilege or Immunity, Petitioners admit that this Court has likewise

treated that subject many times (their Brief page 12). They say, however, that it has not done so in the context of public school officials.

On their pages 12, 13, 14 and 15, the Petitioners discuss several cases which allegedly have disagreed on the application of an official privilege defense in school official cases to varying degrees, but from the discussion it appears that most of the disagreement was among the three judges in the first case discussed, *Smith* v. *Losee*, 485 F.2d 334 (10th Cir. 1973) and their disagreement was more over a factual interpretation in their particular case than a legal interpretation. That decision cited several decisions by the United States Supreme Court wherein the doctrine has already been fairly well spelled out. *Bradley* v. *Fisher*, 80 U.S. 335, 20 L.Ed. 646; *Tenney* v. *Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019; *Barr* v. *Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434; *Monroe* v. *Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492; *Pierson* v. *Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288; *Dombrowski* v. *Eastland*, 387 U.S. 82, 87 S.Ct. 1435, 18 L.Ed.2d 577; *Doe* v. *McMillan*, 412 U.S. 306, 93 S.Ct. 2018, 36 L.Ed.2d 912.

There does not seem to be any substantial variation in the discussion of the degree of application of the doctrine; the difference comes merely in applying it to specific factual situations, and there is no way that the United States Supreme Court or any other court can eliminate that by any further repetition or rephrasing of the terminology of the doctrine. Therefore, there is nothing that compels any further review of the subject than has already been had by the United States Supreme Court.

All of the cases cited by the Petitioners have been read but a discussion of them would not be helpful. Suffice it to say that they are not applicable and not helpful

in this case. Many of them actually can be taken as examples of the federal courts making rulings entirely consistent with the decision of the Court of Appeals in this case. Respondents will touch on them briefly.

Shelton v. *Tucker*, 364 U.S. 479, 487 (1960), this was the decision overturning an Arkansas statute which required teachers to file, as a condition of employment, a detailed affidavit setting forth a considerable amount of personal data, much of which was unrelated to their qualifications for teaching.

Tinker v. *Des Moines Community School District*, 393 U.S. 503, 507 (1969). This is the case where some students and teachers wore black arm bands to protest the Vietnam War. Action of the school board in suspending them was held to be unconstitutional.

Epperson v. *Arkansas*, 393 U.S. 97 (1968). This is the case that held the Arkansas statute prohibiting the teaching of evolution as unconstitutional.

Pickering v. *Board of Education*, 391 U.S. 563 (1968). This case involved the teacher who wrote a letter to the newspaper criticizing the school board and school administration for their manner of handling a campaign to increase school taxes. She was discharged and brought suit and obtained reinstatement.

Freeman v. *Gould Special School District*, 405 F.2d 1153 (8th Cir. 1969). Suit by teachers to compel the school district to renew their teaching contracts, damages and attorney's fees. Circuit Court of Appeals, 8th Circuit, Judge Lay dissenting, held that since there was no discrimination and since Arkansas school boards had an absolute right not to rehire, same was an internal matter and presented no question of Federal due process.

Murray v. *West Baton Rouge Parish School Board,* 472 F.2d 438, 444 (5th Cir. 1973). This suit was purely an attack on the reasonableness of a state statute, high school regulations and a system of psychological testing used in the elementary schools. The Court held all three to be reasonable. There had been no denial of any hearings and no suspensions without hearings. The Court did say:

> Page 443: "It is clear that suspension for 40 days or more without provision for a prior hearing presents serious due process problems."

Shock v. *Tester,* 405 F.2d 852 (8th Cir. 1969). Plaintiff brought suit on ground of denial of equal protection of the laws, because as he claimed, the State police had filed a false and fraudulent police report exonerating a well known political figure from fault in a car accident. The Court of Appeals, 8th Circuit, held against him because he had not alleged that the action of the police was intentional or purposeful discrimination. The Court of Appeals indicated that had he so alleged he would have brought himself within *Snowden* v. *Hughes,* 321 U.S. at page 8, where such was held to state a cause of action.

McLaughlin v. *Tilendis,* 398 F.2d 287 (7th Cir. 1968). Suit by probationary teachers against superintendent and school board alleging that a non-tenured teacher was dismissed solely because of his membership in a union. The Court of Appeals held that this stated a claim upon which relief could be granted under the Civil Rights Act.

REPLY TO ARGUMENT OF PETITIONERS

The very first sentence under the portion of the petitioners' brief heading REASONS FOR GRANTING THE WRIT states:

> This case involves important issues as to the jurisdiction of federal courts to intervene in the day-to-day operations of the public school systems of this country.

Respondents disagree with that statement. The effort of the board is to play the matter down and treat it as though it were a routine, daily affair, inconsequential when viewed in the light of the operation of the school. This is unfair to the students. It reduces them virtually to nonentities. It is contrary to the realities of the situation. It is not a daily, routine matter in the public schools of Mena, Arkansas for three students to be penalized this severely. In fact. the superintendent could remember about only six prior expulsions during his tenure of more than seven years at the school.

What this case involves is the right of a school board to hold a secret meeting late at night without notice to either parents or children and destroy one full year of study by three students, blight them for life and make a permanent record against them, without calling any witness who knew anything at all except what three little scared fifteen year old girls had "confessed" in fright and while pleading for mercy. The only two witnesses that ever appeared before the board were not witnesses at all. They were teachers who apparently were somewhat afraid for their own jobs. Mrs. Curtis Powell, the Home-Ec teacher, after obtaining the first "confession" by promises that it would be held confidential and never reported any higher up in the school system, reneged on her promise,

giving to the girls as her reason that if information on the incident reached her superiors otherwise than through her that she would lose her job.

The second statement of the Petitioners under this section is:

> At issue is the extent to which a public school student has a federally protected right to challenge a school board decision to suspend him from school when the grounds for the suspension
>
> (1) do not involve deprivation of any specific constitutional right and
>
> (2) the challenge to the suspension rests merely on an alleged lack of substantial evidence supporting the decision.
>
> Respondents disagree with that statement.

Perhaps there is nothing in the federal constitution requiring states to maintain systems of free public education, but when a state elects so to do, then the decisions from the federal court are literally legion that the citizens of that state have a federally protected constitutional right to receive the benefits of that state provided education. In the case of *Ordway* v. *Hargraves*, 323 F. Supp. 1155 (D. Mass. 1971), at page 1158, the court said:

> It would seem beyond argument that the right to receive a public school education is a basic personal right or liberty. Consequently, the burden of justifying any school rule or regulation limiting or terminating that right is on the school authorities. *Richards* v. *Thurston*, 424 F.2d 1281 (First Circuit 1970).

As to subparagraph (2) set out above, the word "substantial" has no place in the case at all. There not only

was not "substantial" evidence; there was *no evidence*. As stated by the Court of Appeals:

> No evidence was presented at either meeting to establish the alcoholic content of the liquid brought to the campus. Moreover, the board made no finding that the liquid was intoxicating.

Judge Mehaffy, in his dissent, repeatedly attempted to characterize this case as one in which the Circuit Court of Appeals was passing on the sufficiency of the evidence before the school board and requiring the United States District Court to do the same thing. That view is entirely incorrect and misconceives the whole problem.

The problem is that this school board eliminated one entire year of school work by these three students and saddled them with a permanent record and permanent stigma without any evidence at all; and we do mean that they did it without any evidence at all. It was not a question of sufficiency or insufficiency of evidence. It was a situation of a school board taking some severely drastic action without any evidence at all.

Judge Williams in his opinion (Petitioners' brief page A-20) stated:

> The Plaintiffs themselves concede that they violated the school policy, ...

Likewise, Judge Mehaffy, in his dissent, picked up this remark and stated (Petitioners' brief page A-12):

> the students by their own admission had violated the rule . . . .

This statement is not accurate. It is in direct conflict with the testimony. The students never at any time admitted that they had violated the rule. The students were

quite frank and honest in telling exactly what they did but they never did undertake to express any opinion whatever about whether they had violated the rule or not. On cross-examination, Dr. John Woods, president of the school board at the time the action was taken, admitted, after several repetitions of the question, that the students had not violated the rule and that they had been eliminated from school, destroying one year of school work when, in fact, they had not violated the school rule. This is in the testimony of Dr. John Woods. It is in the cross-examination. He admitted that the children had not violated the rule. The statement in the opinion of the District Judge and the statement in the opinion of Judge Mehaffy that the students admitted violating the rule is not correct. It does an injustice to these children in that it makes them appear as though they were confessing their guilt even under circumstances where no effort has ever been made by the board to prove them guilty and, as a matter of fact, the uncontroverted circumstances demonstrate conclusively that they did not violate the rule and were not guilty of violating the rule. Their little childish prank was not a violation of the rule which was invoked against them and under which they were severely punished. Therefore, there is no question of "lack of substantial evidence." There is no question of the Court of Appeals passing on the sufficiency of evidence before the school board. The question is whether or not the school board has a constitutional right to destroy one year of study and place a stigma upon a student without any proof whatever of any violation of any of its rules, whether valid or not.

Later, on page six, Petitioners state:

> Reasoning that no violation of the rule had thus been established, the Court of Appeals equated that with a violation of substantive due process and held the suspensions invalid.

The Petitioners considerably oversimplify the opinion, reasoning and rulings of the Court of Appeals. A fundamental proposition of the whole matter is noted by the Court of Appeals at opinion page six as follows:

> We hold that the suspensions for the balance of the semester imposed by the board were severe enough to require that due process be afforded the affected students. They resulted in the girls effectively losing nearly a full year's credits.

The Board in effect sentenced these three girls to the loss of a year, to the stigma of having been expelled and excluded from their class for nearly a full semester, and to the having of a permanent record of expulsion made against them as required by the rule, and which obviously would be furnished to any prospective employer or to any college who made inquiry for a transcript of the students' school records. The Court of Appeals certainly was on firm ground in holding that a penalty of this magnitude could not be assessed without affording these children due process of law.

On page seven of their petition and brief the Petitioners quote Judge Mehaffy as stating:

> Nor is this case where the procedure accorded the students was inadequate, unreasonable, or unfair.

We beg to take emphatic issue with the Petitioners and with the learned Judge. This is indeed a case where the procedure accorded the students was grossly inadequate, extremely unreasonable and extremely unfair.

On their page eight, the Petitioners quote Judge Mehaffy as saying:

. . . after full procedural protection was afforded, the rule was enforced.

Again, we wish to take emphatic issue with the Petitioners and the learned Judge. No procedural protection whatever was afforded, much less full procedural protection.

The opinion of the Circuit Court of Appeals, page six, states:

> We think it clear that the students were denied procedural due process at the February 18 meeting of the board.

Certainly it is clear. This was a secret meeting, held at night, after 9:00 P.M. when most meetings of this nature either have adjourned or are adjourning, without any notice whatsoever to the children or their parents and without any witnesses of any kind present and with no inquiry whatever into the fundamental issues of a violation of the rule, the board arbitrarily with no proof and no investigation, sentenced these three children to a very severe penalty. There was no procedural protection and no substantive protection.

On their opinion page 6 the Court of Appeals stated:

> "We recognize that the March 2 meeting may have cured the procedural defects because it was held promptly after the suspension, and because the students and their parents were given notice of the time and place of the meeting and were given an opportunity to present evidence. But we need not decide whether, in fact, the meeting did so because the students were denied substantive due process at both meetings."

No doubt it is from this second meeting that Judge Mehaffy is drawing his conclusion that procedural due process was afforded and that all prior wrongs were thus righted.

As a matter of fact, the truth established by the proof is that the meeting was granted only after it had been repeatedly refused by both the superintendent Inlow and by the president of the Board Stevenson and by some members of the Board, and it was finally and grudgingly granted only after the students and their parents hired an attorney. The meeting was just as grudgingly conducted as it was granted. The Board members assembled and sat in stony silence while the children apologized and begged to be reinstated. Again, no proof whatever was presented by the Board and no investigation whatever was made by the Board to determine if indeed the children had violated the rule. Further, the two teachers who had been at the earlier meeting, the one at which the children were expelled, were both in the building, unknown to the children, their parents or attorney, and neither was called into the room by the Board nor presented before the children and their parents and attorney. Further, the attorney had attempted to obtain the presence of the children's home room teacher and that likewise was frustrated by the superintendent, Inlow. The following is from the record:

> At appendix page 53, Mr. Inlow was asked by plaintiffs' attorney referring to the meeting of March 2:
>
> "Q. Did you know that I had called Peggy's homeroom teacher, Mrs. Gazell, and asked her to be present, be there?
>
> A. Yes, sir.
>
> Q. Did you talk to her about that?

A. I talked with her later that day; she came to me, I did not send for her, she came to me.

Q. What did you tell her about attending any meeting that night?

A. I told her she did not have to attend; if she cared to, certainly she would be welcome to attend."

Here we have an example of the attorney for the plaintiffs making arrangements for the homeroom teacher to attend the meeting. Such teacher being naturally concerned about her relationship with her supervisors, reports the request to Mr. Inlow and he tells her that she does not have to attend. What would any teacher do? Naturally, she got the message that it would be better for her if she did not attend.

The only two "witnessess" at the February 18 hearing were Mr. P. T. Waller and Mrs. Curtis Powell. Let us again look at the appendix, page 45, where we find these statements by Mr. P. T. Waller:

"Q. Now, then, I want to ask you about a meeting of the School Board on March 2nd, Thursday night of last week; where were you Thursday night of last week?

A. I was in the building.

Q. Why didn't you come to the meeting?

A. Because I was right in my office there, if they needed me—I told them that if they needed me, I asked Mr. Enlow if I should go and the attorney asked him if I should go and they said 'if we need you we will call you', so I worked in my office about ten yards from where the meeting was being held. They could have got me at any time."

Page 46:

"Q. But you never did come in the meeting?

A. No, sir.

Q. And the reason of course was you was not asked to come in?

A. No, sir, I was not asked.

Q. Well—

A. But I was available.

Q. Did you see me while I was there?

A. No, sir.

Q. For the record I did not see him, Your Honor, and did not know he was in the building. Now, of course, not (24) attending the meeting you do not know whether Mrs. Powell was there or not?

A. Yes, Mrs. Powell was definitely there.

Q. She was there? How do you know that?

A. She was working in her room.

Q. She was in the building too?

A. Yes and was available.

Q. Do you know why she did not come to the meeting?

A. No, sir."

At appendix page 53, again in Mr. Inlow's testimony immediately following that previously referred to and still referring to the meeting of March 2, we find:

"Q. Now, on the occasion of the meeting of course you did attend, didn't you?

A. Yes, sir.

Q. You took the minutes of the meeting?

A. Yes, sir.

Q. Did you know that Mr. Waller was there in the building?

A. I did.

Q. Did the Board know that?

A. Yes, sir.

Q. Did you know that Mrs. Powell was there in the building?

A. Yes, sir.

Q. Did the Board know that?

A. I think so. Some of them at least."

Neither meeting furnished either procedural due process or substantive due process. A second meeting had likewise been held by the Board in the case of *Vought* v. *Van Buren Public Schools*, 306 F. Supp. 1388 (A. D. Mich. S. D. 1969) where the Court said at page 1393:

> "Plaintiff claims he was entitled to a hearing. Defendants say he got one. Defendants refer to the Board meeting when Plaintiff appeared with his parents and his attorney. This was subsequent to the expulsion. Plaintiff had been presented with a *fait accompli* at this point."

The decision cited on page 7 of their Brief by the Petitioners assumes that the penalty assessed upon these children was an inconsequential and routine matter in the "daily operation" of the Mena School system. This is in direct conflict with the facts.

On page 8 of their Brief the Defendants admit that Federal Courts have jurisdiction to protect students whose rights of speech, association, religion or equality of race or sex have been infringed by school administrators

or Board members. The Petitioners imply, however, that these are the only rights of students which Federal Courts have jurisdiction to protect. A legion of cases from the Federal Courts establish otherwise.

Petitioners follow this with a statement: "And it is equally clear that education itself is not a federally protected right" and cite a case dealing with the financing of school systems and in which the Plaintiffs were attempting to force a state to establish and finance a particular type of educational system. Cases dealing with the constitutionality of state laws regulating nudism would have about as much relevance here as that type of case; however, a recent decision by this Court demonstrates that federal courts do have jurisdiction in cases involving the type of education a State is going to furnish, even though doing so may involve problems of coming up with more money. See *Lau* v. *Nichols*, ... U.S. ....., 39 L.Ed.2d 1 (2-18-74).

On page 9 the Petitioners follow a discussion of that irrelevant case, *San Antonio School District* v. *Rodriquez*, ... U.S. ....., 36 L.Ed.2d 16 at pages 44-46, with this statement:

> "Thus the finding herein of a violation of a federal 'substantive due process' rests on nothing more than the Court of Appeals' conclusion that the suspension decision was 'wrong,' or unsupported by substantial evidence."

Respondents disagree with that statement. It oversimplifies the approach, reasoning, conclusions and ruling of the Court of Appeals. That finding by the Court of Appeals rests upon a record showing that there was no proof whatever, not just insubstantial proof, but no proof whatever; zero proof; of any violation of the school rule. There is indeed a difference in connotation between the

terms "substantial evidence" and "no evidence". The finding by the Court of Appeals that there was a violation of federal substantive due process is based upon a record in which there is no evidence whatever of any violation and yet an arbitrary, groundless, unexplained ruling by the Board that this severe penalty must be suffered by these children.

In its next paragraph on page 9 the Petitioners assume that no constitutional right is involved and thus by so doing distinguish all of those authorities which they cite. By also saying that "grievances arising out of merely erroneous decisions by state and local officials do not rise to constitutional proportions" Petitioners likewise distinguish their discussion from this case. This is not a situation of a "merely erroneous decision by local officials". This is a case where the decision made by the Board was made without proof, without evidence, without the presence of the persons punished, without notice to them, without any protection at all, either procedural or substantive and which resulted in the imposition of a penalty which was severe in the extreme. It was arbitrary, unreasonable, unfair, highhanded, officially adjudged punishment of the worst sort.

At the bottom of page 11 the Petitioners refer to a virtual explosion of litigation initiated by disgruntled, non-tenured school teachers concerning non-renewal of their teaching contracts. There is litigation explosion in several other areas also, products liability, other areas of law relating to consumers, ecology, etc., etc. What that has to do with this case, or why these children should be sentenced to this punishment, and such sentence permitted to stand, admittedly escapes us. How the fact of litigation explosion in particular areas can be argued as a ground for denying constitutional protection to those entitled to it is indeed a novel argument.

CONCLUSION

The Petitioners have failed to establish any basis for the exercise by the Court of its discretion to grant a Petition for Writ of Certiorari in this case and, accordingly, the Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX I

Response to Application for Extension of Time in Which to File Petition for Writ of Certiorari

To the Honorable Harry A. Blackmun, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eighth Circuit:

1. Respondents deny that there is any basis for granting an extension of time to the Petitioners for the filing of a Petition for a Writ of Certiorari in this case. The only reason stated in the Petition is not sufficient.

2. Respondents deny that the nature of the case is fully and accurately stated in the Petition.

3. Respondents deny the allegation that no prejudice will result to them from the requested extension.

4. Respondents state that ninety days is more than sufficient time for the Petitioners to have decided whether or not to seek a review of the decision of the Court of Appeals and to prepare and file a Petition for Writ of Certiorari. Petitioners are not entitled to an extension of time and have failed to show themselves entitled to such extension of time.

WHEREFORE, Respondents respectfully request that the application for extension of time be denied.

APPENDIX II

Brief Separate Statement in Support of Response

Section 2101 (c) of Title 28, United States Code, provides as follows:

> Any other Appeal or any Writ of Certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A Justice of the Supreme Court, *for good cause shown* may extend the time for applying for a Writ of Certiorari for a period not exceeding sixty days (emphasis added).

Rule 22, Supreme Court Rules, subparagraph no. 4, provides in pertinent part that an application for extension of time "must set forth with specificity the reasons why the granting of an extension of time is deemed justified." The subparagraph ends with these words:

"Such applications are not favored."

Justice Jackson commented upon this language in his decision in *Knickerbocker Printing Corporation* v. *United States of America*, 99 L. Ed. 1292 (b September 3, 1954). In that case the reason given for the requested extension of time was that the applicant's attorneys had been actively engaged in the preparation of matters previously scheduled for trial in other courts. Justice Jackson found that reason to be insufficient.

Here the only reason given is that "the undersigned Counsel have just been retained on this date to represent the Petitioners before this Court".

No reason is given as to why the Petitioners thought it necessary to change lawyers between the Court of Appeals and the U. S. Supreme Court. It could hardly have been lack of competency on the part of the lawyers who have been dropped.

The Petitioners S. L. Inlow and Duddy Waller were represented in the trial court and in the Court of Appeals by the law firm of Warren and Bullion, a long established law firm in the City of Little Rock, Arkansas. Although unknown to us we are as confident of it as if we knew it that both Mr. Warren and Mr. Bullion have been admitted to practice before this Court for many years and probably several years before either Mr. Friday or Mr. Smith. Both Mr. Warren and Mr. Bullion are prominent, able and competent attorneys. Mr. Bullion is a former President of the Arkansas Bar Association. Trial of this case was had in the United States District Court for the Western District of Arkansas on August 17, 1972, and Mr. Eugene Warren actively participated in that trial representing Mr. Inlow and Mr. Waller. As noted, he likewise continued representing them on through the Court of Appeals.

The remaining Petitioners have been represented, since prior to the filing of this lawsuit, by Honorable Joe H. Hardegree, a practicing attorney at Mena, Arkansas since about 1960. Mr. Hardegree served three terms as Prosecuting Attorney for the District in which he is located. It is unknown to the writer of this Brief whether Mr. Hardegree is admitted to practice in the United States Supreme Court but we would be very surprised if he is not. He represented the Petitioners other than Inlow and Waller in the trial of the case in the United States District Court in Fort Smith and represented them on the appeal in the Court of Appeals.

If it was necessary for the Petitioners to change Counsel following the denial of the Petition for rehearing in this case, that could have been done much sooner than December 13, 1973, only thirteen days prior to the end of the ninety-day period allowed for filing a Petition for Writ of Certiorari. There is no intention here to criticize any of the lawyers, either those formerly representing the Petitioners nor those now doing so. The case does not belong to the lawyers. It belongs to the Petitioners and it is their responsibility to move the case on schedule and to make their decisions about which lawyers they will employ in time for those lawyers to perform the duties for which they are employed. The Petitioners have procrastinated from September 27 until December 13 before hiring new lawyers; thus the risk that the new lawyers cannot perform in time belongs to those who procrastinated, and not to the Respondents. Actually, ninety days is more time than is needed for the filing of a Petition for Writ of Certiorari. Appeal time to the Court of Appeals and appeal time to the Supreme Court of the State of Arkansas from an Arkansas Trial Court is only thirty days. These attorneys are accustomed to that thirty-day limitation. If it was going to be necessary to change attorneys between the Court of Appeals and the United States Supreme Court this certainly could have been determined and effected shortly after September 27 if Petitioners had shown any reasonable diligence.

Respondents submit that the reason for the requested delay is insufficient and that extension of time should be denied.

APPENDIX III

Motion to Revoke Order Extending Time

Comes Respondents herein and for their Motion to revoke an Order extending the time of the Petitioners to file a Petition for a Writ of Certiorari in this case respectfully state:

1. The letter of transmittal by Mr. G. Ross Smith to the Clerk of this Court, and the Certificate of Service on the pleading styled APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI, demonstrate that the application was prepared and mailed on December 13, 1973. The copy thereof supplied to Counsel for the Respondents arrived in his office on December 14, 1973, a Friday. It arrived too late for attention on that date and on the following Monday, December 17, 1973, Counsel for Respondents did the necessary legal research and dictated the necessary pleadings in response to the said application. This dictation was typed and mailed on Tuesday, December 18, 1973, the second business day after the copy of the application was received.

2. The Response and Brief Separate Statement in Support thereof demonstrate that there is a failure to show "good cause" for such extension as is required by Section 2101(c) of Title 28, United States Code, as a basis for extending the time for applying for a Writ of Certiorari, and further demonstrate that such "good cause" does not exist in this case.

3. The pleading entitled RESPONSE TO APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI and the BRIEF

SEPARATE STATEMENT IN SUPPORT OF RESPONSE TO APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI, both of which were forwarded for filing in this case by Respondents on December 18, 1973, are hereby incorporated in this Motion by reference as fully as if set out herein word for word and line for line.

.4 Rule 22 of this Court, subparagraph number 4, provides that applications of this nature are not favored.

5. The circumstances of this case, where the applicants have failed to show any good cause for an extension of time as required by statute, and where no good cause exists, and where such applications are not favored, demonstrate unequivocally that the present application for extension of time should not be granted.

WHEREFORE, Respondents respectfully move that the Order of December 17, 1973 be withdrawn and that the extension of time be cancelled and the December 26, 1973 deadline be re-imposed, respected and enforced.